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Retention of Possession as Evidence of Fraud in Pennsylvania

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RETENTION OF POSSESSION AS EVIDENCE OF FRAUD IN PENNSYLVANIA.

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INTRODUCTORY.

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After a thorough investigation of the effects of a failure by the vendor to change possession, more esperially as it related to personalty, it will be found to occupy a very prominent place in the law of fraudulent conveyances. This class of cases arises where the creditor has levied on the goods in the possession of the debtor, and the vendee comes forward and attempts to claim such goods. The doctrine has its foundation in the Statute of 13 Elizabeth ch. 5, which is the foundation of all our modern statutes and judicial decisions on the subject of fraudulent conveyances in this country. BY its provisions all conveyances and dispositions of property, real or personal made with the intent to delay, hinder, or defraud creditors are void and fraudulent as against such creditors.

The fact that the vendor remained in possession of the goods is acknowledged by all jurisdictions to be evidence of the fraudulent intent, but the courts are far from being harmonious as to what weight should be given to such evidence. Some courts hold that retention of possession is only prima facie evidence of the fraudulent intent and is

a question for the jury to decide; while others hold that the mere retention of possession is fraud per se and a question of law for the court to decide. The former is by far the prevailing rule; the latter is followed by Pennsylvania and a few other States.

Since the courts of Pennsylvania hold that retention of possession is fraud per se and a question for the court to decide, it will be the purpose of this article to trace the Pennsylvania decisions on this point,-giving the reasons for their holding, and presenting such modifications of the broad general rule as the public policy of this State seems to demand.

RETENTION OF POSSESSION AS EVIDENCE OF FRAUD IN PENNSYLVANIA.

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ACTUAL CHANGE OF POSSESSION REQUIRED. The subject of retention of possession, in Pennsylvania, may be said to date from the decision of Clow v Wood, 5 S.& R.275,(1819). Chief Justice Sharswood in Mc Kibbin v Martin, 64 Pa. 352, has justly called Clow v Wood, "the magna charta of the law of Pennsylvania, on fraud in the transfer of possession". It was said in Clow v Wood, "that the Statute of 13 Eliz. does not in words declare a conveyance of goods fraudulent where the vendor remains in possession: but in general terms renders void all conveyances made to the end, purpose, and intent of defrauding creditors". This case established the broad principle that retention of possession of goods by the vendor, after the title to such goods has been transferred to another, is conclusive evidence of fraud on the vendor's creditors or innocent purchasers from him. It is immaterial whether or not a fraudulent intent existed; the mere fact of remaining in possession of the goods with the vendee's consent, if such goods are reasonably capable of delivery, is fraud per se and a question of law for the

court to decide.

In all the cases bearing on this subject it is argued that public policy should induce such a comprehensive construction of the Statute of 13 Eliz. as to take in all cases, except those where the goods are incapable of delivery, or where the change of possession would defeat fair and honest objects to be affected thereby. The earlier cases of Wilt v Franklin, 1 Binn. 502; and Dawes v Cope, 4 Binn. 258, acknowledge the principle that retention of possession was fraud per se, but they confined its application to narrow limits. The courts have always clung to the decision of Clow v Wood, 5 S.&R.275, and it is now an inflexible rule which makes it fraud per se if the possession does not follow as well as accompany the transfer: Young v Mc Clure, 2 W. & S. 147; or as is said in Streeper v Eckert, 2 Wh. 382, "if there be any principle established by these cases, it is that a transfer of personal property unaccompanied by a corresponding transmutation of possession is void as against creditors". To the same effect see Babb v Clemson, 11 S. & R. 419

If A sells goods to B, and A remains in possession of the goods, and they are capable of delivery, such goods are

liable to levy and sale by the creditors of A, and the sale between A and B will be declared fraudulent as a matter of law. See Hoofner v Clark, 5 Wharton 545, where the vendor kept and fed the horse in the same stable as he did before the sale; Carpenter v Mayer, 5 Watts 483, where the vendor kept goods in the same house. To the same effect see Young v Mc Clure, 2 W. & S. 150, sale of oxen; Cadbury v Nolan, 5 Pa. 320, sale of timber; Forsyth v Mathews, 14 Pa. 100, sale of bar-fixtures; Dewart v Clement, 48 Pa. 413, sale of canal boat; Bar v Boyles, 96 Pa. 31, sale of machinery; Hulbert v Simons, 20 W. N. C. 15, sale of safe.

Milne v Henry, 40 Pa. 31, being a complicated case, may warrant the facts in being set out in full. A, a merchant, having failed, bought goods on credit as agent of his wife. These goods were not paid for out of her own money. She now sold the store to her brother B, the consideration being a $500. note; but no money on it was paid. No inventory of the goods were made, the same sign remained in the window, same clerks were employed, and there was no outward visible change of possession. A remained in the store attending to business in the same manner as before the sale. Goods were levied upon by the creditors of A . Held, that

as the property first purchased was not paid for by the wife's own money, she had no title to the goods, but the ownership was in her husband A, and the sale or pretended sale to B was fraudulent because A remained in possession of the goods.

All these cases come to the conclusion that retention of possession is fraud per se and a question of law for the court to decide. They say that the possession of personal property is prima facie evidence of ownership, and that under the appearance of this ownership, every man is justified in regerding him as still being the owner, and in giving him credit or extending indulgence to him on account of it. In Streeper v Eckert, 2 Wharton 307, it is argued that if it were permitted under such circumstances to withdraw the property from the seller's creditors, it would work injustice to such creditors, because it may be fairly presumed to have influenced them in giving credit to the party. However, it is not necessary that the creditor should assert or prove that he was deceived by the false appearance of ownership. " It is immaterial whether or not the creditor trusted the debtor on the strength of the goods being in the debtor's possession". Martin v Machoit, 10 S. & R. 214.

The mischief is the same because it would often be a very difficult task for one man to prove what induced him to give credit to another. As a general rule, however, the possession of goods by the debtor has always been a material point in inducing credit.

The Pennsylvania courts have always been very favorable to creditors and bona fide purchasers. They have therefore maintained the doctrine that in order to prevent the community from being deceived by an apparent ownership in property, after the title to such property has been transferred, the person in whom the title rests must take the property into his exclusive possession, or in some public way exercise rights of ownership over it. If the vendee allows the property to remain in the hands of the vendor, the vendor's creditors can seize it. The same rule applies to conditional sales, and if the vendor delivers possession of the property to the vendee with a reservation that the vendor may recover the property upon the failure of the vendee to pay all the purchase money, it becomes liable to execution by the vendee's creditors: Rose v Story, 1 Pa. 190; Waldron v Haupt, 52 Pa. 403; Haak v Tinderman, 64 Pa. 499; Emver v Van Griesen, 6 W. N. C. 363; Stradtfelt

v Huntsman, 92 Pa. 53; Brunswick v Hoover, 95 Pa. 503. But if A the owner of goods leaves them in the possession of B as bailee of the goods, such goods are not liable to levy and sale by the creditors of B: Edward's Appeal, 105 Pa. 109. In order to determine whether the contract is one of bailment or conditional sale, we must ascertain, from the terms of the contract the intent of the parties: Enlow v Klien, 79 Pa. 488. It may be convenient for the parties to agree that the vendor should remain in possession, or in a conditional sale that the vendee should have possession, and these contracts will be enforced by the courts as between the parties; but when the rights of third persons are affected by giving credit to the vendor when he retains possession of the goods, or by giving credit to the vendee when such vendee has possession of the goods under a conditional sale, the rights of such third persons are paramount. Heretofore I have been treating of the sale as being declared fraudulent as against the creditors of the vendor in possession, and I have shown that where the vendor remained in possession, the sale was fraudulent as to his creditors. We found also that the same rule applied to the vendee in possession under a conditional sale.

Suppose now, that the vendor in possession sells the goods to an innocent third party who takes the goods into his own possession. Will such third party get good title as against the first purchaser? In Shaw v Levy, 17 S. & R. 101, A sold goods to B, but A retained possession of them. A now sold the same goods to C, a bona fide purchaser, who took possession of the goods. In a suit between B and C to determine who was to have the goods, the court held that the goods belonged to C. "As between the first purchaser and the vendor the property belonged to the purchaser; but when it passed to the hands of a bona fide second purchaser, without notice, it would be against sound policy to allow the first purchaser to recover". This decision was based on the theory that where one of two innocent parties must suffer, he who is the cause of the loss must bear it. The vendee having permitted the vendor to remain in possession, the vendor was enabled to commit fraud on innocent third parties, and the vendee must bear the loss. The cases say this principle has its foundation in the common law, and is not necessarily depending on the Statute of Eliz. In Davis v Pugh, 62 Pa. 242, G sold lumber to M who immediately made a contract with G to run it to market. It was left with

G until he started to run it; G on the way sold it to B. Held, B got good title. The decisions are followed in Crawford v Davis, 99 Pa. 576; and Miller v Browarsky, 130 Pa. 372. The same rule applies where the vendee in possession under a conditional sale, sells the goods to an innocent third person. "It is the same with a conditional sale; for the retention of possession is essential to retention of a lien on personal property": Waldron v Haupt, 52 Pa. 403. In Stradtfelt v Huntsman, 92 Pa. 53, A bought and took possession of goods, payment to be made on installment plan. There was a written contract to the effect that the title to the goods was to remain in the vendor till the payment of the full purchase price. Before the purchase price was paid A sold the goods to B , an innocent third party, who had no notice of the reservation of title in the original vendor. Held, B got good title, and the first contract was fraudulent as to innocent third person.

WHAT IS A SUFFICIENT CHANGE OF POSSESSION? The general rule is that there must be an actual change of possession, but there are numerous occasions on which an actual change is not required. In such cases constructive poss-

ession is sufficient. The delivery must be actual and such as the nature of the property sold, or the circumstances of the sale will reasonably admit. Separation of the property from the vendor's possession means only a change of his relation to it as owner, and consists in the surrender and transfer of his power over it to the vendee. If, however, the goods are capable of actual delivery a constructive delivery will not be enough: Bellingsley v White, 59 Pa. 464. But it often becomes difficult to determine whether or not certain acts will warrant a finding of constructive change of possession. In such cases the jury is to decide the question, and in doing so it takes into consideration the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property. See Crawford v Davis, 99 Pa. 576; Mc Clure v Folney, 107 Pa. 414. In Bond v Bunting, 78 Pa. 210, it is said that goods in the hands of a carrier, or stored in a warehouse, may be delivered by the delivery of the bill of lading or the warehouseman's receipt. A sale of goods in the hands of a bailee is good against an execution creditor, although there is no actual delivery, if the vendor does not retake possession:Tinton v Butz, 7 Pa. 89.

To the same effect see Whigham's Appeal, 63 Pa. 194. In Barr v Reitz, 53 Pa. 256, the owner of household goods sold them, moved out of the house in which they were, and delivered the keys to the purchaser. Held, "whether the goods were removed from the house in which the owner remained, or the owner removed from the house in which the goods remained, the visible relation between them was broken and the public was put on its duty to inquire". In Hugus v Robinson, 24 Pa. 9, there was a sale of a store, the vendee continuing to do business in the old stand. The court in determining whether there was a sufficient change of possession said, "is it contrary to public policy for one who buys a store of goods, to continue to do business in the same place"? It was held to be a sufficient change of possession. To the same effect is the case of Benford v Schell, 55 Pa. 393, where it was held that the delivery of the keys of a safe and the keys of the room in which it was, would be a sufficient delivery of possession. But where there are several piles of lumber that are incapable of delivery, they should be marked at once with the name of the owner or they will be liable to levy by the vendor's creditors: Long v Knapp 54 Pa. 514. In all these cases there

is held to be a sufficient change of possession if the vendee will exercise such a control over the goods as will reasonably indicate to all the fact of a change of ownership. Chief Justice Sharswood in Mc Kibbin v Martin 64 Pa, 357, sums s up some of the cases of constructive possession in these words; "If the articles of sale are not capable of delivery, then a constructive delivery will be enough. As in the case of a vessel at sea, goods in a warehouse, a raft of lumber, a kiln of bricks, etc." See also Cadbury v Nolan 53 Pa. 520; Chase v Ralston , 30 Pa. 539; Clow v Wood, 5 S. & R. 275; Renninger v Spartz, 128 Pa. 524. "This rule is applied as the circumstances require in order to make its application just" : Stephans v Gifford 137 Pa. 219.

POSSESSION MUST BE TAKEN WITHIN A REASONABLE TIME AND BE CONTINUOUS. The decisions are uniform in holding that the change of possession must take place at the time of the sale, or within a reasonable time thereafter. See Carpenter v Mayer, 5 Watts 433; Babb v Clemon, 10 S. & R. 419. As to what is a reasonable time depends upon the circumstances of each particular case. If there is a sale of a

vessel at sea, the possession should be taken as soon as it conveniently can after its arrival: Morgan v Biddle, 1 Yates 3; if the vendee takes possession before execution was issued against vendor it will be sufficient: Woofsmith v Cope, 5 Wharton 58; where A bought household goods from B, and B was going to occupy the same house, the fact that A remained in possession six days would not make it fraud per se: Barr v Reitz, 53 Pa. 256; in sale of household furniture the purchasers were looking for a house for three weeks after the sale, held, that a judgment taken out eight months after such sale could not be collected out of such goods: Smith v Stern, 17 Pa. 360.

The change of possession must be continuous in the vendee and if the property gets back to the possession of the vendor it will be liable to execution by vendor's creditors. Where a vendee of oxen, after keeping them in his possession a few hours, returns them to the vendor as a security for a loan, they are liable to levy and sale by the vendor's creditors: Young v Mc Clure, 2 W. & S. 147. "In all cases where the delivery has been temporary and followed by a return to the seller, the law regards it as colorable and fraudulent in law": Garman v Cooper, 72 Pa. 32.

There is a retention of possession in the meaning of the law, in all ordinary cases where the property comes back to the late owner shortly after the transaction in question: Miller v Garman, 69 Pa. 134; Mc Clure v Folney, 107 Pa.414; but if the goods remain in open and notorious possession of the vendee for a considerable length of time, and then get back to the possession of the vendor, the court cannot declare such transaction void in favor of vendor's creditors: Dunlap v Bournonville, 26 Pa. 72; Mc Marlan v English, 74 Pa. 296; Bond v Bronson, 80 Pa. 360.

If the vendee, after a delivery of the goods, allows the vendor to again have possession of such goods, and the vendor sells them to a bona fide purchaser, such purchaser will get good title: Davis v Bigler, 62 Pa. 242.

CONCURRENT POSSESSION. The transfer must be actual, continuous, and exclusive in the vendee; concurrent possession is evidence of fraud. "It is mere mockery to put another person to keep possession jointly with the former owner": Babb v Clemson, 10 S. & R. 428; see Bawn v Kellar, 43 Pa. 106; Miller v Garman, 69 Pa. 135. Judge Agnew in Warman v Kramer, 73 Pa. 379, defines concurrent possession

to be, "where the control and use of the goods by the vendor and vendee are so mixed up and confused as to leave the question of possession uncertain". If the vendor occupies the same relation to the property as he did before the sale, the court will pronounce it fraudulent per se. See Hoofner v Clark, 5 Wharton 545; Brawn v Kellar, 43 Pa. 104; Stellwagon v Jeffries, 44 Pa. 407; Snyder v Shuh, 10 W.N.C. 136; Mc Kibbin v Martin, 64 Pa, 352.

But there are cases of concurrent possession where the court will not pronounce such possession as being fraudulent per se; as for example, where there was a sale from father to son, and the son having removed the goods to another place where his father continued to live with him, and do small jobs about the premises. In such a case "it certainly was not necessary for the son to turn his father out of doors": Mc Vicker v May, 3 Pa. 224. In Hugus v Robinson, 24 Pa. 9, the vendee purchased the drugstore for his son, the son having been a clerk of the vendor. The sign having been changed, the son took possession and employed the vendor as manager. Held, not a concurrent possession as to make the transaction fraudulent. In cases of postnuptial settlements by the husband to the wife, there

is necessarily a concurrent possession: Larkin v McMullin, 49 Pa. 29, or where the wife bought goods from the husband in good faith, and she paid for them with her own money: Skinner v Kroh, 4 Pa. 204. See also Dunlap v Bournonville, 26 Pa. 72, where the vendor remained as foreman; Billingsby v White, 59 Pa. 464, where vendor remained as clerk; Ziegler v Hendrick, 106 Pa. 87, where vendor had desk room in the store; Rothermel v Marr, 98 Pa. 285, where vendor and vendee were brother and sister living in the same house. In all these cases the court would not pronounce the concurrent possession as fraudulent per se, but if there were any facts tending to show that the vendor retained any beneficial interest in the business, or took money from the till to pay his own debts, or that such of the proceeds of the business went to him as was beyond a reasonable compensation for his services,- these were reasonable questions of fact for the jury and it might be justified in finding that the transfer was not bona fide. See Stull v Weigle, 20 W.N.C. 98.

This class of cases is not looked upon very favorably by the courts and it will take but very slight evidence to have them declared fraudulent. Judge Agnew, in Barr v

Reitz, 53 Pa. 258, said Dunlap v Bournonville, and Hugus v Robinson, supra, "stand on the very outer edge of settled principles". In Mc Kibbin v Martin, 64.Pa. 361, C. J. Sharswood, after acknowledging that the vendee may employ the vendor as his agent in conducting the business, said, "I frankly confess that I have not regarded this line of decisions with favor". He followed these cases not because he believed they were just, but because, "I have been too long on the bench (25 yrs.) not to have learned the lesson- that a judge has no right to adhere to his favorite opinions after they have been reversed or overruled".

JUDICIAL SALES. Heretofore I have been treating of the retention of possession after private sales. We now come to a discussion of the cases wherein the judgment debtor, after a sale on execution, retains possession of the goods with the consent of the vendee, and we find a distinction between private sales and judicial sales. The theory, on which retention of possession by the vendor is in a private sale declared fraudulent, is that such sales are known only to the immediate parties; but in a judicial sale every person is bound to take notice of the transfer

of the title, and hence there can be no uncertainty as to who is the true owner. Therefore a retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud: Walter v Mc Clellan, 4 Dallas 208; Staller v Kirkpatrick, I Mona,436; Bellas v Mc Carty, 10 Watts 44; Meyers v Harvey, 2 P. & W. 478; Lathrop v Wightman, 41 Pa. 297; Craig's Appeal 77 Pa. 448; Smith v Cristman, 91 Pa. 430; Miller v Irvine, 94 Pa. 405. This class of cases often arises where the purchaser is a relative of the judgment debtor and the latter is allowed to retain possession of the goods as a matter of charity or benevolence. The permission of the debtor to remain in possession, "is certainly a humane and generous arrangement; and if done in good faith, deserves commendation rather than censure": Rolard v Brooke, 127 Pa. 144. But if the goods are bought in with the debtor's money, the goods will be liable to subsequent executions against him: Walter v Germant, 13 Pa. 515; or if one buys cloth at a sheriff's sale and leaves it with the debtor to be made up for debtor's own use with the understanding to account to the purchaser for the price, it is a sale to the debtor and is liable to execution: Dick v Lindsay, 2 Grant 431, and Dick

v Cooper, 24 Pa. 217; or if the chattel is capable of consumption and is left with the debtor for his own use and consumption, it becomes liable to creditors: Heitzman v Divil, 11 Pa. 264. If it cannot be shown that the purchaser meant to relinquish all claim over the goods when he allowed the debtor to remain in possession, the subsequent creditors may seize such goods: but if there is only a mere possibility of the debtor repurchasing the goods, his creditors have no claim on them: Maymes v Atwater, 88 Pa. 496; Bisbing v Third Nat. Bank, 93 Pa. 78. The purchase and retention of possession must both be made in good faith. If then, the judgment creditor is subsequently paid the amount of his debt in full, the goods in possession of the judgment debtor are liable to levy by another creditor: Scott v Chancellar, 20 Pa. 195. Neither is there a presumption of fraud where the debtor remains in possession: Walter v Germant, 13 Pa. 515, for "the law does not repeal such charity by any presumption of fraud so as to authorize the seizure of those goods as the property of the debtor": Maynes v Atwater, 88 Pa. 476.

ASSIGNMENTS. At a very early date the courts were

called upon to decide whether or not assignments for the benefit of creditors were to be placed in the same category with judicial sales. In the early cases of Cunningham v Neville, 10 S. & R. 204; and Hower v Geeseman, 17 S. & R. 251, the court held that retention of possession by the assignor was fraudulent per se. Assignments were placed on the same footing with private sales- the court citing Clow v Wood, 5 S. & R. 275, with approval. But it must be remembered that the latter case was not the case of an assignment, but was the case of retained possession by the mortgagor of a chattel mortgage. That retention of possession by the assignor was declared fraudulent in the early cases, can be accounted for only by the fact that they were decided but a few years after Clow v Wood. This case seemed to be so extensive in its terms as to include judicial sales and assignments; but as has been shown by the late cases, this intended strictness has not been rigidly enforced. An honest assignment to secure a pro rata distribution among all the creditors should be fostered. If the goods are to be held in trust for all the creditors, nothing would be more unjust than to allow some one of them to levy on the goods and have the assignment declared fraud-

ulent because the assignor remained in possession. One creditor has no more claim on the debtor's goods than another. Nothing can be more honest on the part of the debtor, than to pay all his creditors alike by a general assignment for their benefit, and the law should not, therefore, demand a change of possession of the goods if all have an equal interest in them. These early decisions may have influenced the Legislature somewhat, for in 1836 an Act was passed requiring an inventory of all the assigned goods to be recorded within thirty days from the day of assignment. The retention of possession in a private bill of sale is made fraudulent on account of the secrecy of its nature; but since the recording act for assignments, this objection is removed, and assignments are now placed with judicial sales. It is the publicity of the transaction that puts them on the same footing with judicial sales: Dallam v Fitler, 6 W. & S. 323; or, as is said in Fitler v Maitland 5 W. & S. 309, "there can no more be a sham sale by a general assignment than there can be by an execution".

Since the Act of 1836 all persons are held to have constructive notice that the assignee has the title to the goods, and the early cases of Cunningham v Neville,

10 S. & R. 204; and Howes v Geeseman, 17 S. & R. 251, are overruled. At the present time it is well sattled that the mere fact of the assignor remaining in possession of the goods, after the assignment, is not fraudulent— either during the thirty days allowed for recording or after the assignment is recorded: Fitler v Maitland, 5 W. & S. 309; Mitchell's Appeal, 2 W. & S. 253; Bellas v Mc Carty, 10 Watts 44; Klapp's Assignees v Shirk, 13 Pa. 583. The assignment takes effect immediately on the execution of the instrument and it makes no difference whether or not the assignee had notice of the assignment: Wickersham v Nickolson, 14 S. & R. 118; neither will the assignment fail because there has been a failure to appoint an assignee, in such case equity will appoint one: Mark's Appeal, 85 Pa. 231.

The assignment must be bona fide in order that the assignor may remain in possession. But the mere fact that the assignor in possession is employed by the assignee to manage the business or take care of the goods is not fraudulent in itself: Deckard v Case, 5 Watts 22, because "it would frequently be disastrous to the creditors if the assignor was excluded from the possession and management of

property": Fitler v Maitland 5 W. & S. 309.

CHATTEL MORTGAGES. At common law all sales, pledges, and mortgages of personal property were void as to third parties, unless the possession accompanied and went with the vendee, pledgee or mortgagee. Where the mortgagor retains possession of the goods and exercises a power to dispose of them for his own benefit, it is an effectual shield to a dishonest debtor, for such authority is inconsistent with the idea of a security; and if there can be no real certain security, there can be no certain lien. Even under the recording statutes they may work an injustice on innocent purchasers from the mortgagor in possession, because it is against the custom and general understanding that purchasers should examine the records previous to purchasing personal property.

The common law idea of chattel mortgages has undoubtedly secured a firm foothold in Pennsylvania, for it is said in Euwer v Van Gliesin, 6 W.N.C. 363, that "in Pennsylvania, chattel mortgages are not sanctioned. The common law rule prevails that one man shall not have a lien on personal property owned by and in possession of another,

as against creditors and innocent purchasers". In Clow v Wood, 5 S. & R. 275, A executed a chattel mortgage to B. A remained in possession and continued to exercise ownership over the goods. Subsequently A's creditors levied on the goods and sold them under execution. Held, that "the mortgagor's possession under the transaction was fraudulent per se and void against bona fide creditors". If then, the mortgagee allows the mortgagor to remain in possession, he does so at his peril, for it is said, "that a mortgagee out of possession has no priority over a creditor who has obtained a lien": Merchant's Bank v R'y. Co. 4 W. N. C. 264. See also Fry v Miller, 45 Pa. 441; Bismark Association v Bolster, 92 Pa. 123. This rule extends to contracts made in other States; and a mortgagee in Maryland who permits the mortgagor to retain possession of the mortgaged goods (not found in Maryland), and the mortgagor brings them into Pennsylvania where he disposes of them to a bona fide purchaser, such purchaser gets good title to the property: MacCabe v Blymyre, 9 Phila.R. 625. If, however, the purchaser has notice of the mortgage, he cannot claim the goods as against the mortgagee: Cobb v Nonemaker, 78 Pa. 501.

Heretofore we have been treating of mortgages not provided for by statute. The Legislature has passed several Acts allowing the mortgagor of chattels to retain possession of them on complying with certain requisites of the statutes. Thus by the Act of 1855 it was made lawful for the lessees of collieries, manufactories and like premises to mortgage their leases, machinery, etc. By the Act of 1876 chattel mortgages for not less than $500. were allowed on saw-logs, sawed lumber, laths, shingles, oil in barrels or reservoirs, iron ore, canal boats, etc. This Act having expired in five years by its own limitation, it will be found subsequently re-enacted by the Act of 1887. By the Act of 1891, chattel mortgages for not less than $100. may be given on cement, boilers, engines, oil, nails, iron sheets, gas and artesian wells supplies, etc. Such mortgages must be in writing signed by the mortgagor and duly acknowledged the same as deeds and mortgages of real estate. They are to be recorded and remain in effect one year unless renewed within thirty days previous to their expiration.

The mortgagor of all such articles enumerated by these statutes may retain possession of such articles and

the mortgage will be good against his creditors and bona fide purchasers from him, the fact of recording being a constructive notice to everybody that the articles are mortgaged.

CHATTELS REAL. Chattels real form another exception to the general rule that retention of possession is conclusive evidence of fraud. It has on several occasions been argued that chattels real should be placed on the same footing with chattels personal. In the early case of Penna. v Kirkpatrick, 1 Add. 193, there was very strong dicta to that effect. The court in this case said that a lease of lands is considered as a chattel; and a conveyance of a lease unattended with possession is fraudulent. This case is criticised in Williams v Downing, 18 Pa. 65. Judge Chambers said, "much as we respect the opinion of the learned judge in that case on a question of law, yet, without his usual accuracy and discrimination, he confounded the law in relation to personal chattels with that of chattels real". The rule as laid down in the dicta in Pennsylvania vs Downing, was never followed; while on the contrary it has been decided on several occasions that

retention of possession by the lessor, after a sale of the lease, was not fraudulent: Ludwig v Highly, 5 Pa. 141; Avery v Street, 6 Watts 247; Alletown Bank v Beck, 49 Pa. 409; Williams v Downing, 18 Pa. 60; Benninger v Statz, 128 Pa. 524.

----THE END.----

John J. Kelley.

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